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### In the Prosecutor We Trust? A Case Against Permitting Evidence of Unadjudicated Criminal Conduct into the Sentencing Phase of Capital Trials

Anne-Marie von Aschwege

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**IN THE PROSECUTOR WE TRUST? A CASE AGAINST  
PERMITTING EVIDENCE OF UNADJUDICATED CRIMINAL  
CONDUCT INTO THE SENTENCING PHASE OF CAPITAL TRIALS**

I. INTRODUCTION

In *Gray v. Netherland*,<sup>1</sup> Coleman Wayne Gray and Melvin Tucker followed Richard McClelland,<sup>2</sup> the store manager of Murphy's Mart in Portsmouth, Virginia, with the intent to rob him and the store.<sup>3</sup> While high on cocaine the pair forced McClelland into their car and subsequently took \$13,000 from Murphy's Mart.<sup>4</sup> They then drove McClelland to a remote area and shot<sup>5</sup> him six times in the back of the head with a .32-caliber weapon.<sup>6</sup>

The bodies of Lisa Sorrell and her three-year-old daughter Shanta were found in Sorrell's burned car in Chesapeake, Virginia, approximately five months before Gray was charged with the capital murder of McClelland.<sup>7</sup> Sorrell had been shot in the head six times with a .32-caliber weapon.<sup>8</sup> Gray was never charged with the Sorrell murders.<sup>9</sup>

In the sentencing phase of Gray's capital trial, the prosecution put Melvin Tucker, who was testifying against Gray in exchange for a lesser sentence, on the stand to testify that Gray told him "he had 'knocked off' Lisa Sorrell."<sup>10</sup> Gray denied any involvement in the Sorrell murders.<sup>11</sup> The only direct connection between Gray and the Sorrell murders was Tucker's statement.<sup>12</sup> In closing argument, however, the prosecution discussed the similarities between the two murders and argued that he should be sentenced to death for the threat of future violence.<sup>13</sup> After being exposed to gruesome, detailed

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1. 518 U.S. 152 (1996).

2. McClelland had also recently fired Gray's wife. *Id.* at 155-156.

3. *Id.*

4. *Id.*

5. Gray claimed that Tucker was the person who pulled the trigger. *Id.*

6. *Id.*

7. *Gray*, 518 U.S. at 155-156.

8. *Id.*

9. *Id.*

10. *Id.* at 166-67.

11. *Id.* at 175.

12. *Id.* at 176-177.

13. *Gray*, 518 U.S. 176-177.

evidence about the murders of Sorrell and her baby daughter, the jury sentenced Gray to death.<sup>14</sup>

The problem, as Justice Ginsburg stated in her dissenting opinion, was that there was much evidence linking Lisa Sorrell's husband, Timothy Sorrell, to the murders.<sup>15</sup> In fact, the police's number one suspect had been Timothy Sorrell throughout its investigation.<sup>16</sup> Lisa Sorrell felt discontent about Timothy Sorrell's involvement in the sale of stolen goods.<sup>17</sup> Timothy, in speaking to his friends at a party the night before the murders, revealed that he had a .32 caliber weapon.<sup>18</sup> Timothy also made several statements to friends about his desire for his wife to be killed.<sup>19</sup> Additionally, the family suspiciously purchased a life insurance policy for Lisa two weeks before the murders in which Timothy and baby Shanta were named as the beneficiaries.<sup>20</sup> Gray's defense counsel was not given enough time to discover this information, thus the jury never heard any of this evidence.<sup>21</sup>

Melvin Tucker remains in prison for the McClelland murder.<sup>22</sup> Since his part in the sentencing phase of Gray's trial, Tucker has admitted that "his testimony about Gray's admission that he killed the two women was false."<sup>23</sup>

On Wednesday February 26, 1997 at 8.55 p.m., "Gray walked trembling into Virginia's execution chamber . . . and was strapped to the gurney [sic] by guards. Once injected, he lifted his head, looked from left to right and began breathing heavily. He made no last statement."<sup>24</sup> Gray stopped breathing at 9:04 p.m.<sup>25</sup>

Many states allow evidence of unadjudicated conduct in the sentencing phase of capital trials. "[B]ecause there is no level of proof which must be established, there is no way to know whether the alleged conduct even occurred."<sup>26</sup> The objective of this article is to show the many fallacies with allowing unadjudicated criminal conduct in the sentencing phase of capital trials. As long as the United States continues to allow capital punishment, it should do everything in its power to assure that its implementation is as fair and impartial as possible. For this reason, the Supreme Court should rule

14. *Id.*

15. *Id.* at 184 (Ginsburg, J., dissenting).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Gray*, 518 U.S. at 184 (Ginsburg, J., dissenting).

20. *Id.*

21. *Id.*

22. *Stay of Execution Denied for Coleman Gray*, THE VIRGINIAN-PILOT, Feb. 22, 1977, at B3.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55, 65-66 (1999).

against allowing unadjudicated criminal conduct into the sentencing phase of capital trials and finally unify the states on this issue. Even if the Supreme Court does not decide on such a case, the Missouri Supreme Court should decide not to allow this evidence into the sentencing phase of capital trials.

This note will present five arguments for why Missouri should overturn *State v. Christeson*,<sup>27</sup> the Missouri precedent stating that evidence of unadjudicated conduct is allowed into evidence in capital sentencing. The first section will describe domestic and international views on sentencing procedures in capital trials and demonstrate the importance of using international opinions as a guide to United States' opinions. The second argument will contend that *Apprendi v. New Jersey*<sup>28</sup> bars States from allowing unadjudicated conduct into the sentencing phase without proving that conduct beyond a reasonable doubt. The third argument will discuss why evidentiary sentencing standards should ban the prosecution from entering unadjudicated conduct into evidence. The fourth argument will discuss procedural due process in civil cases and how it relates to the criminal cases. This note will next address the current motive that some states, like Missouri, have for permitting the use of evidence of unadjudicated conduct in capital sentencing and then question the soundness of that motive. Finally, the conclusion will come back to the above-mentioned case of *Gray v. Netherland* and suggest that had unadjudicated evidence of criminal conduct been kept out of the sentencing phase, there likely would have been a different result.

## II. INTRODUCTION TO SENTENCING PROCEDURES IN CAPITAL TRIALS

At the outset, it is important to be familiar with the general procedural format of capital trials. First, the defendant must be notified that the government seeks the death penalty, and aggravating factors must be presented to show a justification for the death sentence.<sup>29</sup> Subsequently, in the guilt phase of a capital trial, the jury determines whether the defendant is guilty of the capital offense.<sup>30</sup> If the defendant is convicted, he is provided a separate hearing to determine punishment, known as the sentencing phase.<sup>31</sup>

States must "limit the class of murderers to which the death penalty may be applied," per *Furman v. Georgia*.<sup>32</sup> For this reason, most states have come up with a list of aggravating circumstances and the jury must find at least one for the death penalty to be imposed.<sup>33</sup> The *Furman* requirement is "usually met

27. 131 S.W.3d 796.

28. 530 U.S. 584 (2000).

29. 21 U.S.C. § 848(h)(1)(B) (2006).

30. 21 U.S.C. § 848(i); see also 18 U.S.C. §§ 3591(a)-3593(b) (2006).

31. 21 U.S.C. § 848(i); see also 18 U.S.C. § 3593(b) (2006).

32. 408 U.S. 238, 257 (1972).

33. Even this restriction is becoming meaningless, however. "[S]ome of the added factors are so general—such as if the murder is 'cold, calculated and premeditated'—as to throw the

when the trier of fact finds at least one statutory eligibility factor at either the guilt phase or penalty phase.”<sup>34</sup> The trier of fact must then decide whether the defendant is eligible for the death penalty.<sup>35</sup>

Capital punishment trials occur in two phases.<sup>36</sup> During the first phase, the jury deliberates on whether the prosecution has proved at least one aggravating factor<sup>37</sup> beyond a reasonable doubt and must come to that conclusion unanimously.<sup>38</sup> If the jury does not unanimously find the prosecution upheld its burden of proving an aggravating factor beyond a reasonable doubt, the death penalty cannot be imposed.<sup>39</sup>

Once the jury has found an aggravating factor does exist, it continues to stage two. Here, they must determine if the aggravating factors sufficiently outweigh the mitigating factors, or if the aggravating factors are adequate to validate a death sentence.<sup>40</sup> Mitigating factors only have to be determined by a preponderance of the evidence standard.<sup>41</sup> Finally, “the jury by unanimous vote . . . shall recommend whether the defendant should be sentenced to death, to life imprisonment without the possibility of release, or some other lesser sentence.”<sup>42</sup>

Section 565.030.4 of the Revised Missouri Statutes<sup>43</sup> establishes a four step test in order for a defendant to receive the death penalty.<sup>44</sup>

Step 1 requires the trier of fact to find the presence of one or more statutory aggravating factors set out in section 565.032.2. Step 2 requires the trier of fact (whether jury or judge) to find that the evidence in aggravation of punishment, including but not limited to evidence supporting the statutory aggravating factors, warrants imposition of the death penalty. In step 3 the jury is required to determine whether the evidence in mitigation outweighs the evidence in aggravation found in steps 1 and 2. If it does, the defendant is not

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class of eligible cases wide open. And that, in turn, invites with a neon sign the kind of arbitrariness that the original list of aggravating factors was intended to surmount. Today, one prosecutor’s death penalty case is another’s life sentence.” Editorial, *Fixing the Death Penalty*, CHI. TRIB., Dec. 29, 2000, at A1

34. *Brown v. Sanders*, 126 S.Ct. 884, 887 (2006).

35. *Id.*

36. *Id.*

37. “Aggravating circumstance” or “aggravating factor” is frequently used “to refer to those statutory factors which determine death eligibility in satisfaction of *Furman*’s narrowing requirement.” *Id.* at 889.

38. *Id.* at 887; *see also* 21 U.S.C. § 848(k); 18 U.S.C. § 3593(d).

39. 21 U.S.C. § 848(k); 18 U.S.C. § 3593(d).

40. *Brown*, 126 S.Ct. at 887; *see also* 21 U.S.C. § 848(k). Some states have statutes that say if the mitigating factors equal the aggravating factors, then the death penalty should be imposed. Many states, however, are invalidating those statutes. *State v. Marsh*, 102 P.3d 445 (Kan. 2004).

41. 21 U.S.C. §§848(j)-(k); *see also* 18 U.S.C. §§3593(c)-(d).

42. 21 U.S.C. §848(k); *see also* 18 U.S.C. § 3593(e).

43. MO. REV. STAT. § 565.030.4 (2006).

44. *State v. Whitfield*, 107 S.W.3d 253, 261 (Mo. 2003).

eligible for death, and the jury must return a sentence of life imprisonment. Finally, in step 4 of section 565.030.4, the trier of fact is instructed that it must assess and declare the punishment at life imprisonment if it decides under all of the circumstances not to assess and declare the punishment at death.<sup>45</sup>

In Missouri, a jury can give a life sentence notwithstanding “the weight it gave to aggravators and mitigators it found.”<sup>46</sup>

As a result of the procedural system for sentencing in capital trials, a capital defendant has to “investigate and present a complete and effective case in mitigation while rebutting either or both aggravating circumstances of vileness and future dangerousness.”<sup>47</sup> Because the State may present evidence of unadjudicated criminal conduct to prove future dangerousness, “the capital defendant might have the difficult task of refuting acts that no one ever proved he committed.”<sup>48</sup>

### III. STATE OPINIONS VS. INTERNATIONAL OPINIONS ON UNADJUDICATED CRIMINAL CONDUCT IN THE SENTENCING PHASE OF CAPITAL TRIALS

#### A. *Differing State Decisions in the United States*

The Supreme Court leaves many decisions up to State courts and legislatures. There are some decisions that the Supreme Court directly states should be left up to the states. Other decisions, however, are left for states to decide by default.<sup>49</sup> For this reason, it is important, on issues that the Supreme Court has not decided, to look to state’s decisions throughout the country.

The issue of unadjudicated criminal conduct in the sentencing phase of capital trials has not gone before the Supreme Court. Therefore, by default, the states are left to formulate their own opinions. In the United States, there are eight states<sup>50</sup> that do not allow evidence of unadjudicated offenses at the sentencing phase of capital trials.<sup>51</sup> There are ten states<sup>52</sup> that allow the evidence to come in, but impose “strict procedural protections such as a

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45. *Id.*

46. *Id.*

47. Tamara L. Graham, *Death by Ambush: A Plea for Discovery of Evidence in Aggravation*, 17 CAP. DEF. J. 321, 322 (2005).

48. *Id.*

49. “The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively.” U.S. CONST. amend. IX, § 2.

50. Alabama, Florida, Indiana, Maryland, Ohio, Pennsylvania, Tennessee and Washington. Inter-American Commission on Human Rights, Report No. 52/01, available at <http://www1.umn.edu/humanrts/cases/52-01.html> (last visited Jan. 20, 2007) [hereinafter IACHR].

51. *Id.*

52. Arkansas, California, Delaware, Georgia, Illinois, Louisiana, Nebraska, Nevada, South Carolina and Utah. *Id.*

heightened standard of reliability.”<sup>53</sup> It also must be taken into consideration that twelve states ban the death penalty all together, thus do not need to decide the issue.<sup>54</sup>

Courts give different reasons for not allowing evidence of unadjudicated criminal conduct in the sentencing phase of capital trials. For example, the Supreme Court of Washington found the following:

To allow the jury which has convicted defendant of aggravated first degree murder to consider evidence of other crimes of which defendant has not been convicted is, in our opinion, unreasonably prejudicial to defendant. A jury which has convicted defendant of a capital crime is unlikely fairly and impartially to weigh evidence of prior alleged offenses. In effect, to allow such evidence is to impose upon a defendant who stands in peril of his life the burden of defending, before the jury that has already convicted him, new charges of criminal activity. Information relating to defendant's criminal past should therefore be limited to his record of convictions.<sup>55</sup>

Additionally, in Alabama it was found that “[u]ntil the State proves him guilty of this charge in accordance with appropriate legal procedures [the defendant] is presumed innocent . . . [t]his fundamental tenet of our system of justice prohibits use against an individual of unproven charges in this life or death situation.”<sup>56</sup>

Some courts, however, side with Missouri, and allow such evidence into the penalty phase. In Virginia it was found that there was no “due process requirement that the Commonwealth prove beyond a reasonable doubt that the defendant engaged in the unadjudicated criminal conduct offered as evidence in the sentencing phase of a capital murder trial.”<sup>57</sup> Furthermore, the Court looked to *Patterson v. New York*,<sup>58</sup> stating that “the state need not prove

53. *Id.*

54. These states are Alaska, Hawaii, Iowa, Maine, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin.

55. *State v. Bartholomew*, 654 P.2d 1170, 1184 (Wash. 1982).

56. *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1979).

57. *Walker v. Com.*, 515 S.E.2d 565, 572 (Va. 1999). There is also an interesting incongruity in Virginia:

at sentencing for non-capital felonies, unadjudicated criminal conduct is inadmissible. However, adjudicated criminal conduct is admissible to prove, to some extent, future dangerousness. Nevertheless, in capital cases, where the punishment is final and more severe, evidence of unadjudicated criminal conduct is admissible. If the Virginia legislature and courts are unable to see any “relationship” between unadjudicated conduct and the appropriate sentence in non-capital cases, it is difficult to understand how the legislature and courts can see such a relationship in capital cases where the potential punishment is infinitely more severe and final.

Future Dangerousness: Issues and Analysis, 12 CAP. DEF. J. 55, 65-66 (1999).

58. 432 U.S. 197 (1977).

beyond a reasonable doubt every fact it recognizes as a circumstance affecting the severity of punishment.”<sup>59</sup>

*B. Missouri’s Decision to Permit Unadjudicated Criminal Conduct in the Sentencing Phase of Capital Trials*

In Missouri there is no “future dangerousness” statutory aggravator, therefore evidence of unadjudicated criminal conduct is considered a “non-statutory aggravator” and is used primarily for increasing the weight of the prosecution’s argument.<sup>60</sup> The rule permitting unadjudicated criminal conduct to be heard in the sentencing phase of capital trials in the state of Missouri was determined in the case of *State v. Christeson*:

Evidence of a defendant’s prior unadjudicated criminal conduct is admissible during the penalty phase. During the penalty phase, both the state and the defense may introduce any evidence pertaining to the defendant’s character, including evidence of the defendant’s conduct that occurred subsequent to the crime being adjudicated.<sup>61</sup>

In *State v. Christeson*, the trial court allowed the jury to hear evidence that the defendant sodomized a person in order to show a “predatory pattern.”<sup>62</sup> This evidence did not have to be proved beyond a reasonable doubt and was allowed in to contradict the mitigating evidence the defense presented.<sup>63</sup>

*C. International Opinion*

1. The Importance of International Opinion in General

Since the creation of the United States Constitution, Supreme Court Justices have looked to international opinion in deciding cases.<sup>64</sup> Most recently, Justice Kennedy has taken up the practice of citing international opinion, causing international opinion to be more focal than ever before.<sup>65</sup>

59. *Walker v. Com.*, 515 S.E.2d 565, 572 (Va. 1999) (citing *Patterson*, 432 U.S. at 214).

60. The Missouri homicide statute contains the following statutory aggravator: “The offense was committed by a person. . . who has one or more serious assaultive criminal convictions.” Mo. Rev. Stat. § 565.032(2)(1) (2006). Unadjudicated conduct and future dangerousness, however, are not statutory aggravators in Missouri.

61. *State v. Christeson*, 50 S.W.3d 251, 269 (Mo. 2001).

62. *Id.*

63. *Id.*

64. Jeffrey Toobin, *Swing Shift: How Anthony Kennedy’s Passion for Foreign Law Could Change the Supreme Court*, THE NEW YORKER, Sept. 12, 2005, available at [http://www.newyorker.com/fact/content/articles/050912fa\\_fact](http://www.newyorker.com/fact/content/articles/050912fa_fact) (last visited Jan. 20, 2007).

65. “Had the practice of citing foreign sources been confined to liberal—and, in the current political arrangement of the Court, less influential—Justices, it would have remained a phenomenon primarily of academic interest. . . .” When Kennedy, who’s hardly a liberal, started



International judges face analogous problems to those of the United States, therefore it is useful to look to foreign opinions.<sup>66</sup> Furthermore, foreign judges are “dealing with texts that more and more protect basic human rights,” and if foreign problems are comparable to those of the United States, why not read what the foreign judges are deciding, even if only for educational purposes.<sup>67</sup> Finally, in an argument best stated by Justice Kennedy, “[i]f we are asking the rest of the world to adopt our idea of freedom, it does seem to me that there may be some mutuality there, that other nations and other peoples can define and interpret freedom in a way that’s at least instructive to us.”<sup>68</sup>

## 2. Trend towards Following International Opinion in Capital Punishment Cases

International opinion should be specifically applied to capital punishment cases. In his recent article, *International Influence on the Death Penalty in the U.S.*, Richard Dieter illustrates why international opinion should and is starting to have an effect on capital punishment decisions in the United States.<sup>69</sup> First, recently in the United States there has been an acknowledgement of the “need for international cooperation and respect for the laws of other democracies.”<sup>70</sup> Dieter also states that “there is a broader intersection between United States capital punishment law and the interests of other countries.”<sup>71</sup> Finally, international opinion has changed so that instead of an assortment of views on capital punishment among United States allies, there is now a “growing consensus condemning its use in general.”<sup>72</sup>

An example of the United States using international opinion in a capital punishment case is in *Atkins v. Virginia*,<sup>73</sup> where the Supreme Court held that the execution of persons with mental retardation constituted cruel and unusual punishment.<sup>74</sup> The opinion mentioned an amicus curiae brief by the European

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citing these international sources, that’s when the subject exploded in the broader political world,’ says Dorsen, who in 2003 founded the *International Journal of Constitutional Law*.” *Id.*

66. *Id.*

67. *Id.* This was said at a debate at American University in Response to Scalia’s statement that international opinion is immaterial because “we don’t have the same moral and legal framework as the rest of the world, and never have.” *Id.*

68. *Id.*

69. Richard C. Dieter, *International Influence on the Death Penalty in the U.S.*, FOREIGN SERVICE J., Oct. 2003, available at <http://www.deathpenaltyinfo.org/article.php?scid=17&did=806> (last visited Jan. 20, 2007).

70. *Id.*

71. *Id.* Dieter cites as examples “[i]ssues of extradition, the execution of foreign nationals, and the prospects of military tribunals to deal with suspected foreign terrorists often put the death penalty and international human rights concerns in direct conflict.” *Id.*

72. *Id.*

73. 536 U.S. 304 (2002).

74. *Id.* at 321.

Union that banned executions of persons with mental retardation.<sup>75</sup> “The clear inference of this reference was that international opinion played a role in determining the standards of decency as they evolved in a maturing society.”<sup>76</sup> Even though only eighteen states banned executions of persons with mental retardation, “the Court found evidence of a consensus when these states were joined with many other factors, including world opinion.”<sup>77</sup>

Most recently, the Supreme Court cited international opinion in *Roper v. Simmons*<sup>78</sup> when it found the death penalty to be unconstitutional for juveniles.<sup>79</sup> The majority opinion stated that:

[i]t is proper that we acknowledge the overwhelming weight of international opinion against the juvenile death penalty. . . [i]t does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.<sup>80</sup>

The United States should follow its opinions in *Atkins v. Virginia* and *Roper v. Simmons* and cite to the Inter-American Commission on Human Rights (IACHR) decision, *see infra*, ruling that evidence of unadjudicated criminal conduct should not be allowed into the sentencing phase of capital trials.<sup>81</sup> In the United States, eighteen states limit the use of this evidence, in addition to the twelve states that ban the death penalty all together.<sup>82</sup> When taken into consideration with world opinion, it is clear that the “evolving standards” in society<sup>83</sup> support the disuse of this evidence.

Even if the United States opts not to take on the issue of evidence of unadjudicated conduct in the sentencing phase of capital trials, Missouri should recognize that its abolition by fellow states and international opinion indicates a need for its reevaluation. As the Supreme Court is concerned with more pressing and complicated issues, Missouri should not look at the lack of adjudication of the issue as the Court being in agreement with Missouri’s

75. *Id.* at 316, n.21.

76. *See* Dieter, *supra* note 69.

77. *Id.*

78. 543 U.S. 551 (2005).

79. *Id.* at 575.

80. *Id.* at 578.

81. *See* IACHR, *supra* note 49.

82. *Id.*

83. In an speech given to his students in Europe, indicating the importance of society, Justice Kennedy stated “Here you are in Europe. . . [a]nd you might think, Gee, look at this culture, look at these churches, look how old everything is. But you have the oldest constitution in the world. We have a legal identity, and our self-definition as a nation is bound up with the Constitution. . . [t]here is also the constitution with a small ‘c,’ the sum total of customs and mores of the community. . . [t]he closer the big ‘C’ and the small ‘c,’ the better off you are as a society.” *See* Toobin, *supra* note 59.

approach. Therefore, Missouri should follow the same logic as the *Atkins* and *Roper* decisions, and look to world opinion as evidence of the need to overturn *State v. Christeson*.

### 3. International Structures in Place for the Protection of Human Rights and for the Facilitation of Implementing International Views

#### i. The IACHR and Its Function

The IACHR is a body in the inter-American structure for the “promotion and protection of human rights.”<sup>84</sup> It is an independent branch of the Organization of American States (OAS).<sup>85</sup> The IACHR’s “mandate is found in the OAS Charter and the American Convention of Human Rights.”<sup>86</sup> The IACHR speaks for each of the member States<sup>87</sup> of the OAS.<sup>88</sup> Seven members of the IACHR act independently, without speaking for any individual country.<sup>89</sup> “The members of the IACHR are elected by the General Assembly of the OAS.”<sup>90</sup> The IACHR is a “permanent body which meets in ordinary and special sessions several times a year.”<sup>91</sup> The principal function of the IACHR is to endorse the “observance and defense of human rights.”<sup>92</sup>

Additionally, the IACHR’s decisions are only recommendations, and are not legally binding in the United States.<sup>93</sup> While the decisions are not binding, the petitioners and the states often come to an agreement.<sup>94</sup> The following chart shows the “total number of friendly settlement reports published”:

84. *About the OAS*, <http://www.oas.org/main/main.asp?sLang=E&sLink=../documents/eng/memberstates.asp> (last visited Jan. 20, 2007).

85. Also, the OAS “brings together the countries of the Western Hemisphere to strengthen cooperation and advance common interests. It is the region’s premier forum for multilateral dialogue and concerted action.” *Id.* The OAS takes on such tasks as defending democracy, protecting human rights, strengthening security, fostering free trade, combating illegal drugs, and fighting corruption. *Id.*

86. *Id.*

87. The membering states of OAS are: Antigua and Barbuda, Argentina, the Bahamas, Barbados, Belize, Bolivia, Brazil, Canada, Chile, Columbia, Costa Rica, Cuba, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Guyana, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadinas, Suriname, Trinidad and Tobago, United States of America, Uruguay, and Venezuela. *Id.*

88. IACHR, *available at* <http://www.cidh.org/> (last visited Jan. 20, 2007).

89. *Id.*

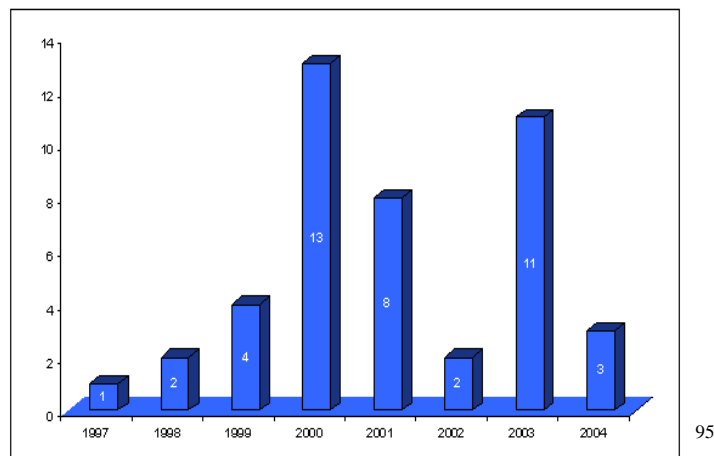
90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *See* IACHR, *supra* note 88.



ii. The Role of the American Declaration and Its Interplay with the IACHR

“The American Declaration is an international human rights instrument that contains fair trial guarantees.”<sup>96</sup> The IACHR “has the authority<sup>97</sup> to entertain individual petitions alleging that OAS member states, including the United States, have failed to comply with their obligations under the American Declaration of Rights and Duties of Man.”<sup>98</sup>

While the American Declaration was not implemented as a legally binding treaty, the OAS Charter, of which the United States is a part, is legally binding.<sup>99</sup> The IACHR has determined “that the American Declaration ‘acquired binding force’ by means of the amendments to the OAS Charter adopted in 1967-68.”<sup>100</sup>

95. *Id.*

96. American Declaration of the Rights and Duties of Man, OAS Res. XXX (May 2, 1948), available at <http://www.cidh.org/Basicos/basic2.htm> (last visited Jan. 20, 2007).

97. *Id.*

98. Statute of the Inter-American Commission on Human Rights, OAS Gen. Ass. Res. 447, 9th Sess., art. 20, available at <http://www.cidh.org/Basicos/basic15.htm> (last visited Jan. 20, 2007).

99. IACHR, Resolution 3/87, *Roach & Pinkerton v. United States*, ¶¶ 46-49, reprinted in *Inter-American Yearbook on Human Rights*, 294-96 (1987).

100. *Id.*

iii. *United States v. Garza*, a Case Submitted to the IACHR Concerning Unadjudicated Criminal Conduct in the Sentencing Phase of Capital Trials

In *United States v. Garza*, Juan Raul Garza headed a drug trafficking enterprise.<sup>101</sup> After setbacks from an intermittent seizure by law enforcement, Garza became suspicious of some of his workers tipping him off to the police, and had one victim killed as a forewarning to De La Fuente, the victim's associate.<sup>102</sup> He later had De La Fuente and a third associate that cooperated with authorities killed.<sup>103</sup> "In February 1992, the U.S. Customs Service mounted a sweeping interstate offensive" and "[a]s a result of this raid, most of Garza's associates were indicted and arrested."<sup>104</sup> Garza fled to Mexico and was later caught by police after trying to make a drug deal with an associate that was working with the authorities.<sup>105</sup> Garza, who was one of two defendants, was convicted of two counts of killing in furtherance of the first defendant's, Flores, continuing criminal enterprise, as well as the other drug offenses.<sup>106</sup>

In the sentencing phase, the jury concluded that Garza was responsible for five further killings, and that Garza was a continual threat to others.<sup>107</sup> The jury then "unanimously found that the aggravators sufficiently outweighed the mitigators to justify a sentence of death."<sup>108</sup> He was sentenced to death by the federal court in Texas for the three murders.<sup>109</sup> Garza next filed a petition with the IACHR, stating the evidence of unadjudicated murders in the sentencing phase violated his rights.<sup>110</sup>

iv. The IACHR Report in *United States v. Garza*

Garza asserted in his petition to the IACHR that the United States violated 1) his right to a fair trial under Article XXVIII of the American Declaration and 2) his right to due process of law under Article XXVI of the American Declaration.<sup>111</sup> Article XVIII of the American Declaration states that "[e]very person may resort to the courts to ensure respect for his legal rights. . . [t]here should likewise be available to him a simple, brief procedure whereby the

101. *United States v. Garza*, 63 F.3d 1342, 1351 (5th Cir. 1995).

102. *Id.*

103. *Id.* Garza paid \$10,000 to each person who helped in the killing of De La Fuente. *Id.* at 1352.

104. *Id.*

105. *Id.*

106. *Id.* at 1342.

107. *Garza*, 63 F.3d at 1367.

108. *Id.*

109. *Id.*

110. *See* IACHR, *supra* note 46.

111. *Id.*

courts will protect him from acts of authority that, to his prejudice, violate any fundamental constitutional rights.”<sup>112</sup> Article XXVI<sup>113</sup> states that “[e]very person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with preexisting laws.”<sup>114</sup>

The IACHR found that the United States violated Articles XVIII and XXVI of the American Declaration, in accordance with Garza’s claim.<sup>115</sup> In its opinion, the IACHR recommended<sup>116</sup> the United States look at “its laws, procedures, and practices to ensure that persons who are accused of capital crimes are tried and sentenced in accordance with the rights under the American Declaration, including in particular prohibiting the introduction of evidence of unadjudicated crimes during the sentencing phase of capital trials.”<sup>117</sup>

### C. Conclusion

Clearly, the IACHR disapproves of using unadjudicated prior bad acts during the sentencing phase of capital trials.<sup>118</sup> Its recommendation in *United States vs. Garza* should influence the United States in the sentencing procedure domain. Additionally, Missouri should view the IACHR report and accordingly review its procedure of allowing unadjudicated criminal conduct during the sentencing phase of capital trials, and in doing so will hopefully be influenced to follow the lead of states like Washington and Alabama.

112. American Declaration Article XVIII, available at <http://www.cidh.org/Basicos/basic2.htm> (last visited Jan. 20, 2007).

113. Compare with the U.S. Constitution which states that “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.” U.S. CONST. amend. VI., § 2.

114. See IACHR, *supra* note 49.

115. *Id.*

116. Can only recommend because its decisions are not binding on the United States.

117. See IACHR, *supra* note 49.

118. *Id.*

#### IV. *APPRENDI* V. *NEW JERSEY* AND *RING* V. *ARIZONA* PROHIBIT THE USE OF UNADJUDICATED CRIMINAL CONDUCT IN THE SENTENCING PHASE OF CAPITAL TRIALS

##### A. *Decisions in Apprendi v. New Jersey and Ring v. Arizona*

In New Jersey, the crime of possession of a firearm for an unlawful purpose is a second-degree offense.<sup>119</sup> The punishment for such an offense is five to ten years in prison.<sup>120</sup> There, however, is a second statute that states when a defendant commits a second-degree offense “with a purpose to intimidate an individual or group. . . because of race, color [or] gender[,]” the punishment for the crime can be enhanced to ten to twenty years.<sup>121</sup>

In *Apprendi v. New Jersey*, the defendant was charged with possessing a firearm for an unlawful purpose.<sup>122</sup> He then pled guilty to the charge.<sup>123</sup> During the sentencing phase, the trial judge conducted a hearing and concluded that the defendant had the “purpose to intimidate” because of race.<sup>124</sup> Subsequently, the trial judge, without a jury, gave the defendant more than a ten year sentence.<sup>125</sup>

The Supreme Court held that the defendant had the right to have the issue decided by a jury, rather than by judge alone.<sup>126</sup> “Other than the fact of a prior conviction, *any* fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and *proved beyond a reasonable doubt*.”<sup>127</sup> In coming to this determination, the Court recognized that “due process and associated jury protections extend. . .to determinations that [go] not to a defendant’s guilt or innocence, but simply to the length of his sentence.”<sup>128</sup>

This ruling was applied to death penalty cases in *Ring v. Arizona*.<sup>129</sup> In *Ring*, the jury hung in the trial phase on if Ring committed the offense of premeditated murder, but found him guilty of felony murder.<sup>130</sup> In Arizona, Ring could only be sentenced to death if further findings by the judge in the

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119. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Apprendi*, 530 U.S. at 469.

126. *Id.*

127. *Id.* at 490 (emphasis added).

128. *Id.* at 484 (quoting *Almendarez-Torres*, 523 U.S. at 251 (Scalia, J., dissenting)).

129. 536 U.S. 584 (2002).

130. *Id.* at 591.

sentencing hearing showed that Ring was guilty of premeditated murder.<sup>131</sup> The judge would therefore have to determine the existence of any statutory aggravating and mitigating factors, and ascertain that at least one aggravating factor existed and that no mitigating factor existed that effectuated a call for clemency.<sup>132</sup> After determining the existence of two aggravating factors and no mitigating circumstance that required leniency, the trial judge sentenced Ring to death.<sup>133</sup>

Ring argued on appeal that by allowing a judge to find the fact that raises the defendant's maximum penalty, Arizona violated the Sixth Amendment's trial by jury guarantee.<sup>134</sup> The Arizona court rejected Ring's constitutional argument, upheld the trial court's finding of the two aggravating factors, and reweighed them against the mitigating factor that Ring did not have a serious criminal record.<sup>135</sup> The Arizona court then affirmed the death sentence.<sup>136</sup> Following, Ring appealed to the Supreme Court of the United States.<sup>137</sup>

The Supreme Court found *Walton v. Arizona*,<sup>138</sup> the existing precedent, incompatible with *Apprendi*, and stated that the Sixth Amendment jurisprudence could not permit both opinions to stand.<sup>139</sup> Subsequently, they overruled *Walton* in that it no longer allows a sentencing judge, without a jury, to find an aggravating factor necessary for the imposition of a death sentence.<sup>140</sup> Additionally, because Arizona's specified aggravating factors operate as "the functional equivalent of a greater offense,"<sup>141</sup> the Sixth Amendment requires that a jury, not a judge, finds those factors.<sup>142</sup> In conclusion, the Supreme Court held that the statutory aggravating factor, in the sentencing phase, must be determined by a jury beyond a reasonable doubt, rather than by a judge.<sup>143</sup>

*United States v. Booker*,<sup>144</sup> decided in early 2005, further clarifies *Apprendi* and *Ring*. In *Booker*, the jury sentenced Booker to 210 to 262

131. *Id.* The statutory maximum penalty for first-degree murder is the death penalty, so the judge would have to find first degree murder because the jury only convicted Ring of felony murder which does not invoke the death penalty in Arizona. *Id.*

132. *Id.* at 592-593.

133. *Id.* at 594-595.

134. *Id.*

135. *Ring*, 536 U.S. at 584, 596 (2002).

136. *Id.*

137. *Id.*

138. 497 U.S. 639 (1990). In *Walton* the court ruled that a jury did not have to find the existence of aggravating factors, the judge could. *Id.* at 649.

139. *Ring*, 536 U.S. at 609.

140. *Id.*

141. *Apprendi v. New Jersey*, 530 U.S. 466, 494, n.19 (2000).

142. *Ring*, 536 U.S. at 609.

143. *Id.*

144. 543 U.S. 220 (2005).



months in prison per the Federal Sentencing Guidelines.<sup>145</sup> The judge, at the sentencing hearing, instead gave Booker a thirty year sentence after finding additional facts by a preponderance of the evidence.<sup>146</sup>

The circuit court held that the trial judge's application of the Federal Sentencing Guidelines, in finding additional facts and increasing Booker's sentence, violated *Apprendi* in that it was not submitted to a jury and proved beyond a reasonable doubt.<sup>147</sup> Justice Stevens delivered the opinion of the Supreme Court and found that the Sixth Amendment applies to the Federal Sentencing Guidelines.<sup>148</sup> The Court relied on *Blakely v. Washington*,<sup>149</sup> which stated that "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose without any additional findings," in deciding that the sentence infringed on the Sixth Amendment.<sup>150</sup> The Court then ordered the district court to sentence Booker within the range supported by the jury's findings or to hold a separate sentencing hearing before a jury.<sup>151</sup>

In sum, *Apprendi* states that any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt, in accordance with the Sixth Amendment.<sup>152</sup> *Ring* makes *Apprendi* applicable to death penalty cases, and states that "because Arizona's enumerated aggravating factors operate as the functional equivalent of a greater offense, the Sixth Amendment requires that they be found by a jury" beyond a reasonable doubt.<sup>153</sup> In addition it was noted that:

[b]ecause most jurisdictions already mandated jury sentencing in capital cases, *Ring*'s practical impact was not immediately wide-ranging. However, *Ring* suggested that *Apprendi*'s term 'statutory maximum' meant the maximum sentence that could be imposed solely on the basis of facts found by the jury—a conclusion that turned out to be one of the cornerstones of the *Blakely* Court's analysis.<sup>154</sup>

145. *Id.* at 227.

146. *Id.*

147. *Id.*

148. *Id.*

149. 542 U.S. 296 (2004); In addressing Washington State's determinate sentencing scheme, the *Blakely* Court found that *Jones v. United States*, *Apprendi v. New Jersey*, and *Ring v. Arizona*, made clear "that the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose solely on the basis of the facts reflected in the jury verdict or admitted by the defendant." *Id.* at 303.

150. *Booker*, 543 U.S. at 231-232.

151. *Id.*

152. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

153. *Ring v. Arizona*, 536 U.S. 584, 609 (2002) (quoting *Apprendi*, 530 U.S. at 494, n.19.)

154. Barry Coburn, *Making Sense of Booker and Fanfan*, A.B.A., available at <http://www.abanet.org/litigation/committee/criminal/ring.html> (last visited Jan. 20, 2007).

*B. Application of Apprendi v. New Jersey and Ring v. Arizona to Unadjudicated Criminal Conduct*

These cases are mostly applied to situations where the defendant was not afforded a jury to determine a factor. When taking a closer look at the case language, it is clear from *Ring* that not only is the defendant provided a jury, that jury has to prove the aggravating factor beyond a reasonable doubt.<sup>155</sup>

In *U.S. v. Green*, Judge Nancy Gertner, a Massachusetts U.S. District Judge, ties *Apprendi*, *Ring*, and *Blakely* together with regards to unadjudicated criminal conduct in the sentencing phase of capital trials.<sup>156</sup> Judge Gertner states:

Together, *Apprendi*, *Ring*, and *Blakely* abandoned the Court's previous focus on the procedural protections required when a defendant is exposed to punishment above the statutory maximum. They emphasized the protections that must be accorded more generally to facts, including those factors traditionally characterized as sentencing factors, that are essential to punishment because they increase a defendant's punishment even within a statutory sentencing range. Plainly, prior unadjudicated crimes that the government offers to justify the imposition of the ultimate punishment fit within this category of essential factors. Although defendants urge the Court to treat all nonstatutory aggravating factors alike and require that everything be screened, my ruling is a narrow one, limited to prior unadjudicated crimes. The other non-statutory factors here...do not raise the same constitutional concerns as prior unadjudicated accusations of crime apparently unrelated to the offense and uniquely prejudicial.<sup>157</sup>

The court states in *Apprendi* that any *fact* that increases the penalty for a crime must be submitted to a jury and proved beyond a reasonable doubt.<sup>158</sup> Each alleged unadjudicated criminal act is a "fact." The particular unadjudicated criminal act, especially in states where it is used to show the statutory aggravator of future dangerousness, undoubtedly contributes to the increase of penalty from life without parole to the death penalty; and thus, according to *Apprendi*, should be proved beyond a reasonable doubt.

Even where the evidence of unadjudicated criminal conduct is not used for purposes of finding a statutory aggravator, and used simply to supplement the State's argument that aggravating circumstances outweigh mitigating circumstances, it can still be said that the evidence is used for purposes of

155. *Ring*, 536 U.S. at 584.

156. Judge Gertner on *Ring*, *Apprendi*, and *Blakely* in *Capital Setting*, SENTENCING LAW & POL'Y, June 3, 2005, available at [http://sentencing.typepad.com/sentencing\\_law\\_and\\_policy/2005/06/judge\\_gertner\\_o.html](http://sentencing.typepad.com/sentencing_law_and_policy/2005/06/judge_gertner_o.html) (last visited Jan. 20, 2007) [hereinafter Judge Gertner].

157. *Id.*

158. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000).

increasing the penalty for a crime. Furthermore, as Judge Gertner points out, unadjudicated conduct fits within the “category of essential factors.”<sup>159</sup>

Another case where *Apprendi* was applied to prior acts was *State v. Harris*.<sup>160</sup> Here, the Oregon Supreme Court found that if a prior juvenile adjudication is to be used for purposes of increasing the penalty for a crime, the Sixth Amendment right to a jury trial necessitates that “its existence either must be proven to a trier of fact or be admitted by a defendant for sentencing purposes following an informed and knowing waiver.”<sup>161</sup> If a court can go as far as saying that an *adjudicated* criminal act must be proven by a trier of fact to be able to increase the penalty, then surely an *unadjudicated* act should have to also be proven by a trier of fact.

Surprisingly, however, Oregon still allows unadjudicated conduct into the sentencing phase of capital trials.<sup>162</sup> In *State v. Tucker*,<sup>163</sup> the court asserts that the state’s statute<sup>164</sup> defining what evidence is allowed into the sentencing phase of trials should be interpreted broadly and allow in evidence of unadjudicated conduct.<sup>165</sup> The court’s decision in *Harris* does not seem to correspond with its decision in *Tucker*. The *Harris* case was decided in 2005, versus *Tucker* which was decided in 1993.<sup>166</sup> If the Oregon court were to today apply *Apprendi* to *Tucker*, in the same way it applied *Apprendi* to *Harris*, unadjudicated conduct would not be allowed in the sentencing phase of capital trials in Oregon. Unfortunately, many states, like Oregon, have not updated decisions regarding unadjudicated conduct in congruence with *Apprendi* and *Ring*, and should do so to avoid incongruent decisions.

### C. Conclusion

In conclusion, *Apprendi* clearly bans the use of facts not proved beyond a reasonable doubt to be used in increasing the penalty of a crime.<sup>167</sup> An unadjudicated criminal act is undoubtedly a “fact” for *Apprendi* purposes. The only real question lies in whether or not the fact is used for purposes of increasing the penalty. In states where a statutory aggravator of future dangerousness exists, and the “fact” of an unadjudicated criminal act is given as evidence in contribution to this factor, *Apprendi* surely applies. Arguably, the use of an unadjudicated criminal conduct (“fact”) at any time during the sentencing phase is for the purpose of increasing the penalty of the crime.

159. See Judge Gertner, *supra* note 156.

160. SC S516000 (Or. Aug. 18, 2005).

161. *Id.*

162. *State v. Tucker*, 845 P.2d 904 (Or. 1993).

163. *Id.*

164. OR. REV. STAT. § 163.150(1) (2003).

165. *Tucker*, 845 P.2d at 904.

166. *State v. Harris*, No. SC S516000 (Or. Aug. 18, 2005); *Tucker*, 845 P.2d at 904.

167. *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

Thus, use of an unadjudicated criminal act in the sentencing phase of a capital trial will always violate the well established *Apprendi* rule.

#### V. EVIDENTIARY STANDARDS AT SENTENCING SHOULD PROHIBIT THE USE OF UNADJUDICATED CRIMINAL CONDUCT IN THE SENTENCING PHASE OF CAPITAL TRIALS

##### A. Introduction

During the early-to-mid 1900s, there was an increase in procedural protections for criminal defendants during the pretrial phase and the trial phase, but not for the sentencing phase.<sup>168</sup> Then, in *Townsend v. Burke*,<sup>169</sup> the Supreme Court held that because of the due process clause the defendant's sentence should be centered on accurate information.<sup>170</sup> "Any hope that this decision would lead to increased procedural protections for sentencing was diminished in the following year, however, when the Court decided *Williams v. New York*."<sup>171</sup>

##### B. *Williams v. New York*

In *Williams v. New York*, Williams was found by a jury to be guilty of murder in the first degree.<sup>172</sup> The trial judge imposed a sentence of death *after* the jury had recommended life in prison.<sup>173</sup> "In giving his reasons for imposing the death sentence the judge discussed in open court the evidence upon which the jury had convicted stating that this evidence had been considered in the light of additional information obtained through the court's 'Probation Department, and through other sources.'"<sup>174</sup>

New York law stated that before imposing a sentence, a court had to take into account the defendant's "previous criminal record, any reports of mental, psychiatric, or physical examinations, and any other information that could aid the court in determining the proper treatment of the defendant."<sup>175</sup> During the sentencing phase of the trial, the court discussed what it considered in determining Williams death sentence.<sup>176</sup> Among other things, the court

168. Deborah Young, *Fact-Finding at Federal Sentencing: Why the Guidelines Should Meet the Rules*, 79 CORNELL L. REV. 299, 308 (1994).

169. 334 U.S. 736 (1948).

170. See Young, *supra* note 168.

171. *Id.* at 308.

172. 337 U.S. 241, 244 (1949).

173. *Id.* (emphasis added).

174. *Id.*

175. See Young, *supra* note 168.

176. *Id.*

considered information that Williams had committed thirty other burglaries, had a “morbid sexuality,” and was a “menace to society.”<sup>177</sup>

On appeal, Williams argued that the use of this information violated “the right of an individual to be given reasonable notice of charges against him and an opportunity to examine adverse witnesses, as guaranteed by the Due Process Clause of the Fourteenth Amendment.”<sup>178</sup> The Court found that, in the past, different evidentiary rules had been employed in the sentencing phase than in the trial phase.<sup>179</sup> The Court stated that the reason for the discrepancy is that “the judge at sentencing needed a broad spectrum of information” and that “full access to information was necessary for a judge’s selection of the appropriate penalty because fashioning appropriate individualized, indeterminate sentences required consideration of an offender’s past life and habits.”<sup>180</sup> The Court concluded that the “Due Process Clause should not be applied to require that evidentiary procedure at sentencing match trial procedure.”<sup>181</sup>

*C. Application of Williams and New Cases to Unadjudicated Criminal Conduct in the Sentencing Phase of Capital Trials*

Since *Williams v. New York*, several cases have concluded that, unlike the reasoning in *Williams*, the death penalty is not the same as any other sentence.<sup>182</sup> Justice Stevens, in his majority opinion in *Gardner v. Florida*,<sup>183</sup> stated that the death penalty is qualitatively different than other punishments.<sup>184</sup> Likewise, in *Woodson v. North Carolina*,<sup>185</sup> the Court stated that “there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.”<sup>186</sup>

As noted above, the *Williams* Court stated that “full access to information was necessary for a judge’s selection of the appropriate penalty because fashioning appropriate individualized, indeterminate sentences required consideration of an offender’s past life and habits.”<sup>187</sup> Unlike judges, jurors are not “fashioning appropriate individualized. . . sentences.”<sup>188</sup> They are not hearing an individual’s case, and then comparing it to other cases they have

177. *Williams*, 337 U.S. at 244.

178. See Young, *supra* note 168.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Gardner v. Florida*, 430 U.S. 349, 357-358 (1997).

183. *Id.*

184. *Id.*

185. 428 U.S. 280 (1976).

186. *Id.* at 305.

187. *Williams v. New York*, 337 U.S. 241, 244 (1949).

188. *Id.*

heard in order to fashion an appropriate sentence, like a judge would. In fact, most jurors have probably never even heard evidence of another capital murder. Because of the *Ring* decision that states that a jury, rather than a judge, has to find a sentence of death, it can no longer be said that “a broad spectrum of information” need be given to the sentencer. The “broad spectrum of information,” spoken of in *Williams v. New York*, only applied to a judge’s need, not a jury’s.

Additionally, Justice Marshall, in his dissenting opinion in *Williams v. Lynaugh*,<sup>189</sup> demonstrates another approach to an argument relying on evidentiary standards. He states:

if a defendant has a right to have a jury find that he committed a crime before it uses evidence of that crime to sentence him to die, he has a right that the jury that makes the determination be impartial. A jury that already has concluded unanimously that the defendant is a first-degree murderer cannot plausibly be expected to evaluate charges of other criminal conduct without bias and prejudice.<sup>190</sup>

He goes on further to state that many state courts have come to this conclusion that the “introduction of evidence of unadjudicated offenses violates a defendant’s due process right to an impartial jury.”<sup>191</sup>

#### *D. Conclusion*

For many reasons, evidentiary standards should prevent evidence of unadjudicated conduct in capital sentencing. Because a jury now must determine the sentence in capital trials, the need for a “broad spectrum” of information is diminished because, unlike a judge, a jury cannot “fashion an appropriate sentence” based on its knowledge of other criminal defendants. Additionally, a jury is prejudiced by the evidence it heard during the guilt phase of the defendant’s trial, and thus cannot listen impartially to the evidence of unadjudicated conduct it hears in the sentencing phase of the capital trial.<sup>192</sup> Therefore, unadjudicated prior bad acts should not be allowed in capital sentencing.

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189. 484 U.S. 935 (1987).

190. *Id.* at 938.

191. *Id.*

192. *Id.*

VI. A LOOK AT CIVIL PROCEDURE CASES AND THE INFLUENCE THEY SHOULD  
HAVE ON DECISIONS REGARDING UNADJUDICATED CRIMINAL CONDUCT IN  
THE SENTENCING PHASE OF CAPITAL TRIALS

A. *Mathews v. Eldridge*

Under the disability insurance benefits program created in the 1956 amendment to Title II of the Social Security Act, workers who are completely disabled are provided cash benefits.<sup>193</sup> Eldridge was awarded benefits under this Title in 1968, but in 1972 the state agency, after obtaining reports from his physician and psychiatric consultant, found that his disability had terminated.<sup>194</sup> Eldridge, instead of requesting reconsideration of his disability, brought suit contesting the constitutional soundness of the administrative procedures, created by the Secretary of Health, Education, and Welfare, for evaluating if a continuing disability exists.<sup>195</sup>

The Court recognized a development of considerations helpful in determining what protections are constitutionally required under the Due Process Clause to reduce the incidence of error on decisions affecting life, liberty, or property.<sup>196</sup> The following are the three considerations that the *Mathews* Court determined should be applied:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.<sup>197</sup>

B. *Application of Civil Proceedings to Criminal Proceedings*

Per *Mathews*, the tenets of due process depend on a conscientious analysis of what is at stake.<sup>198</sup> To guide this analysis, the three factor test has been implemented as a procedural safeguard in civil cases since the decision in *Mathews*. The test should translate over to criminal proceedings as well.

In *Mathews*, the problem was that of the constitutional protection of property.<sup>199</sup> With unadjudicated conduct permitted in the sentencing phase of capital trials, the constitutional protection at issue is that of life. It seems

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193. *Mathews v. Eldridge*, 424 U.S. 320, 324 (1976).

194. *Id.*

195. *Id.*

196. *Id.* at 335.

197. *Id.*

198. *Id.*

199. "Nor shall any state deprive any person of life, liberty, or property, without the due process of the law." U.S. CONST. amend. XIV, § 1.

commonsensical that *life*, the most valued right that a human being has, at least be given the same due process analysis that property<sup>200</sup> was given in *Mathews*. If this analysis were introduced in criminal procedure, as it should be, the use of unadjudicated evidence in the sentencing phase of capital trials would probably be seen as a high risk of an erroneous deprivation of the individual rights of the defendant. The third factor, that of the government's fiscal and administrative interest, could not possibly outweigh the risk of deprivation of the individual rights of the defendant.

It is time that Missouri, and the rest of the nation, give criminal defendants who are facing death the same procedural due process as it gives a man who has lost disability payment. Therefore, unadjudicated criminal conduct should not be allowed in the sentencing phase of capital trials because of the procedural safeguards of due process.

#### VII. ARGUMENT FOR PERMITTING EVIDENCE OF UNADJUDICATED CONDUCT IN THE SENTENCING PHASE OF CAPITAL TRIALS AND REBUTTAL TO THAT ARGUMENT

##### A. *Opposing View: Why Proponents Want to Keep Evidence of Unadjudicated Conduct in the Sentencing Phase of Capital Trials*

The main argument, *inter alia*, that States that continue to allow evidence of unadjudicated conduct in capital sentencing use is that because the defendant gets to put forth any mitigating factor in their defense, the prosecution should get to put forth any aggravating factor in rebuttal. "[I]n all capital cases the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant's mitigating evidence."<sup>201</sup> In *Peterson v. Commonwealth of Virginia*,<sup>202</sup> the Virginia Court concluded that the unadjudicated acts of the defendant were admissible because, as the court interpreted, the Virginia statute allows for evidence of "the circumstances surrounding the offense, the history and background of the defendant, as well as mitigating evidence."<sup>203</sup>

##### B. *Rebuttal*

In a study done by William J. Bowers and Wanda D. Foglia in 2003, it was found that "45% of jurors failed to understand that they were allowed to

200. The property here is the money for the disability.

201. *Brown v. Sanders*, 126 S.Ct. 884, 887 (2006) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)).

202. 302 S.E.2d 520 (Va. 1983).

203. *Id.* at 526.



consider any mitigating evidence during the sentencing phase of the trial.”<sup>204</sup> Additionally, “two-thirds of jurors failed to realize that unanimity was not required for findings of mitigation.”<sup>205</sup> Also, surveys indicate that “too many jurors misunderstand a judge’s instructions about what evidence they can consider when weighing the death penalty.”<sup>206</sup> Clearly, these findings reveal that a large percentage of jurors do not understand the importance of mitigating factors. For this reason, the argument that a prosecutor should be allowed to introduce evidence of unadjudicated prior bad acts because the defendant gets to show mitigating evidence of his character is unfounded.

Not only do studies show that jurors do not give proper weight to mitigating factors, some findings indicate that they give too much weight to aggravators.<sup>207</sup> The balance of what is discussed at sentencing deliberations is tipped definitively in the direction of aggravating factors.<sup>208</sup> A further study, done by William J. Bowers, this time with colleague Ursula Bentele, indicated the “guilt-related character of punishment deliberations.”<sup>209</sup> In this survey, the authors looked at what topics are discussed during deliberations in capital sentencing proceedings; and mitigating evidence, out of all the topics, was discussed the least.<sup>210</sup> The following is a recreation of the table indicating the results of the aforementioned study:<sup>211</sup>

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204. Arbitrariness and the Death Penalty, Death Penalty Information Center, *available at* <http://www.deathpenaltyinfo.org/article.php?did=1328> (last visited Jan. 20, 2007).

205. *Id.*

206. Bill Rankin & Cameron McWhirter, *Bar Association Seeks Halt to Georgia Execution*, *available at* <http://www.ajc.com/metro/content/metro/stories/0129deathpenalty.html> (last visited Jan. 20, 2007).

207. Ursula Bentele & William J. Bowers, *How Jurors Decide on Death: Guilt is Overwhelming; Aggravation Requires Death; and Mitigation is No Excuse*, 66 BROOK. L. REV. 1011, 1068 (2001).

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

“TABLE 1: Percent of jurors reporting a great deal of discussion during punishment deliberations on selected topics by type of statute.”

“Panel A. Topics Discussed Most: Guilt and Aggravation”

	Threshold <sup>212</sup>	Weighing <sup>213</sup>	Directed <sup>214</sup>
The defendant’s role or responsibility in the crime	86.1	81.7	82.1
The way in which the victim was killed	73.2	71.3	62.3
How weak or strong the evidence was	70.7	67.7	59.0
The defendant’s motive for the crime	57.2	59.2	55.1
The defendant’s planning or premeditation	54.1	57.5	41.3
The defendant’s dangerousness if ever back in society	55.3	43.8	82.1

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212. In this study, “Threshold” refers to states with threshold statutes. For purposes of this study, in “threshold” states “juries are instructed that they may impose death once they find an aggravating factor and after they consider evidence in mitigation.” See Bentele, *supra* note 206, at 1014.

213. In this study, “Weighing” refers to states with weighing statutes. *Id.* For purposes of this study, in “weighing” states juries “are told to weigh aggravating against mitigating circumstances.” *Id.*

214. In this study, “Directed” refers to Texas, who has a directed statute. For purposes of this study, in Texas “jurors are focused on specific factors such as the defendant’s future dangerousness and the deliberateness or heinousness of the crime in making their penalty decision.” *Id.*

“Panel B. Topics Discussed Least: Aspects of Mitigation.”

	Threshold	Weighing	Directed
The defendant's background or upbringing	20.5	25.5	24.7
Drugs as a factor in the crime	12.7	15.7	24.7
What moral values require	18.7	15.2	6.3
The defendant's IQ or intelligence	13.1	12.0	17.9
Alcohol as a factor in the crime	15.2	7.3	12.2
Mental illness as a factor in the crime	9.9	9.2	9.2

C. Conclusion

In conclusion, the argument that any evidence should be allowed into the sentencing phase of capital trials, including unadjudicated prior bad acts, is unsubstantiated. Not only are jurors misunderstanding the role that mitigation plays in their sentencing deliberations, but jurors are clearly giving too much credence to aggravating factors and not enough to mitigating factors.<sup>215</sup> A defendant facing death cannot possibly be given a fair sentence if the factors that “arguably justify a death sentence” are given more weight than the defendant’s mitigating evidence. Therefore, the argument that unadjudicated evidence be permitted in capital sentencing because “the sentencer must be allowed to weigh the facts and circumstances that arguably justify a death sentence against the defendant’s mitigating evidence,”<sup>216</sup> is not so influential as to keep Missouri and other similar states from banning such evidence.

VIII. CONCLUSION

“revenge *n.* 1. punishment or injury inflicted in return for what one has suffered; desire to inflict this; the act of retaliation.

215. *Id.*

216. *Brown v. Sanders*, 126 S.Ct. 884, 887 (2006) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982)).

justice *n.* 1. justness, fairness; the exercise of authority in the maintenance of right.”<sup>217</sup>

It is time to take a close look at the real purpose behind allowing unadjudicated evidence into the sentencing phase of capital trials. Is it to seek “revenge,” or is the prosecution in search of “justice”? As stated, *supra*, revenge is defined as “punishment or injury inflicted in return for what one has suffered; desire to inflict this; the act of retaliation.”<sup>218</sup> Justice is defined as “justness, fairness; the exercise of authority in the maintenance of right.”<sup>219</sup> Did Gray, *see supra*, die at the hands of the state of Virginia because the prosecution was exercising its authority in the maintenance of *right*, or did he die because the prosecution was retaliating against the death of McClelland? Arguably, Gray’s death was a result of the latter. The prosecution was retaliating against McClelland’s death by using evidence of a crime that Gray had not, prior to his trial, been a suspect. This blatant disregard for fairness makes Gray’s execution vengeful, not just.

The prosecutor “is the representative . . . of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done.”<sup>220</sup> Even in the 1930’s, when this statement was declared in *Berger v. U.S.*, there was an understanding that the prosecution’s goal was not to win at all cost. The prosecution is not pitted against the defendant, with the only goal being to win for their client, as in a civil proceeding. The only purpose for the Sorrell murders to be interjected would be to enable the prosecution to win, not to serve justice.<sup>221</sup> The Sorrell murders should not have entered the sentencing phase because the requirement “in safeguarding the liberty of the citizen against deprivation through the action of the state embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions.”<sup>222</sup>

It will never be known how the jury would have sentenced Gray without the evidence of the Sorrell murders introduced in the sentencing phase of Gray’s trial. At the very least, the jurors would have been less likely to sentence Gray to death if they had not heard the evidence. And even if only *one* juror were to find Gray not eligible for the death penalty without the Sorrell murders, Gray’s life would have been saved.

The purpose of abandoning the precedent permitting unadjudicated criminal conduct into the sentencing phase of capital trials is to avoid outcomes like in *Gray*, and avoid a person dying at the hands of the

217. THE OXFORD REFERENCE DICTIONARY 448, 705 (Joyce M. Hawkins ed., 1986).

218. *Id.*

219. *Id.* at 448.

220. *Berger v. United States*, 295 U.S. 78, 88 (1935).

221. Not only for Gray, but for the Sorrells who undoubtedly would not have wanted another human being unrelated to their deaths, die as a result of them.

222. *Herbert v. Louisiana*, 272 U.S. 312, 316-317 (1926).

government for the wrong reasons.<sup>223</sup> This argument in itself should be enough for Missouri to forbid evidence of unadjudicated criminal conduct that has not been proved beyond a reasonable doubt in the sentencing phase of capital trials. When taken together with domestic and international opinions, the rules in *Apprendi* and *Ring*, evidentiary standards at sentencing, the applicable civil procedure test in *Mathews*, and the deficient role of mitigating factors versus aggravating factors, evidence of unadjudicated conduct should not be permitted in capital sentencing in the name of “justness, fairness, and the exercise of authority in the maintenance of right.”<sup>224</sup>

ANNE-MARIE VON ASCHWEGE\*

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223. Assuming that there are right reasons for a person to be executed by the hands of the government.

224. THE OXFORD REFERENCE DICTIONARY 448 (Joyce M. Hawkins ed., 1986).

\* J.D. Candidate 2007, Saint Louis University School of Law; B.A. Psychology, 2004, B.A. Government, 2004, University of Texas at Austin. First and foremost, I would like to thank my parents, Cindy and Tom von Aschwege. Now more than ever I realize the value of their never-ending love, support, and encouragement. Additionally, I would like to thank my sister Angela; whether she knows it or not, I have always looked up to her. It is because of her that I truly understand the importance of being true to oneself, despite what others may think of it. I especially would like to thank my brother, Ahren. I am convinced that if everybody had his innate ability to know the difference between right and wrong and live accordingly, the world would be without a single problem. Special thanks to Professor Sloss and Professor Thaman at St. Louis University School of Law, their ideas and advice were invaluable to the completion of this Note. Finally, I would like to thank the 2006 Saint Louis University Public Law Review Staff and Editorial Board, especially Jessica Sleater, Tim Niedbalski, Amy Fondell, Amanda Basch and Michael Brockland for all of their hard work during the editing process.